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IN THE
Supreme Court of the United States

October Term, 1971

No. 70-75

MOOSE LODGE No. 107,
Appellant,

v.

K. LEROY IRVIS, *et. als.*

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF PENNSYLVANIA

**MOTION OF WASHINGTON STATE FEDERATION OF
FRATERNAL, PATRIOTIC, CITY AND COUNTRY
CLUBS FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF OF AMICUS CURIAE**

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ARGUMENT IN SUPPORT OF MOTION

The Washington State Federation of Fraternal, Patriotic, City and Country Clubs, a Washington non-profit corporation, moves the Court for leave to file a brief *amicus curiae* directed to the fundamental legal issues not adequately raised by the Petition for Review and requesting the Court to limit the consideration of the constitutional issues presented to the law of the particular case. In support of this motion the Federation shows the Court as follows:

1. The Washington State Federation of Fraternal, Patriotic, City and Country Clubs includes approximately eighty fraternal lodges and an equal number of non-fraternal clubs, including athletic clubs, yacht clubs, golf and country clubs, veterans clubs, social clubs, and other clubs formed for specific private purposes. Although most of the non-fraternal clubs have no by-law provisions restricting membership on the basis of race, creed or national origin, many of these clubs would come within the broad language of the decree of the district court under review.

2. The Federation is an intervenor in *Gerber v. Hood*, Civil No. 7701, W.D. Wash., N. Div.; presently pending before a three-judge district court, wherein various plaintiffs seek to enjoin the Washington State Liquor Control Board from issuing liquor licenses to any private club engaging in discriminatory acts on the basis of race, religion, and national origin, and to require the Board to revoke all licenses already issued to such organizations—whether the discrimination results from restrictive membership clauses or whether the private clubs discriminate by personal choice of the members without restrictions in their constitutions or by-laws.

3. Consent to the filing of a brief *amicus curiae* has been granted by Appellant, but has not been granted by Appellee. This motion seeks permission to address the Court in support of neither party, but to address constitutional issues not raised by Appellant or Appellee.

4. The motion is made because the legal issues raised are not considered adequately addressed to the facts of the case, and because petitioner believes the questions of law will not be adequately presented to the Court, in particular the following:

First. No issue has been made over the breadth of the lower court decree. The district court had no jurisdiction to rule on membership practices since no case or controversy was presented regarding membership. The facts of the case involve only the rejection of a single guest, yet the decree of the district court would bar restrictive membership clauses and all discriminatory membership policies and practices, in addition to restrictive guest policies. The Court should not grant an advisory opinion on issues of such fundamental importance which the facts before it do not demand.

Second. The questions presented by Appellant do not raise specifically the issue of free speech and association, yet the entire crux of the case presented to the Court is whether an individual is free to limit those with whom he associates under the First Amendment and, if so, whether the state may be required to apply its liquor licensing laws so as to compel a private group to change its philosophy of association. In view of the First Amendment right, repeatedly noted by this Court, to enjoy freedom of speech and association for whatever private purposes, however unorthodox, controversial or even repulsive, Appellant's members without doubt have free choice in the matter. This is conceded by Irvis.

However, without considering whether these First Amendment freedoms can be so limited, Irvis argues that the equal protection clause of the 14th Amendment requires the state to withhold a liquor license because of the beliefs and organizational purposes of the individual licensee. The mandate of the equal protection clause is that the state cannot do precisely what Irvis demands: it cannot pick and choose among applicants upon the basis of their beliefs and philosophy and must grant licenses

equally to all persons regardless of their race, creed or beliefs. Attributing the purposes of the licensee to the state would deny the equal protection of the law to those who seek to exercise their First Amendment rights by limiting those with whom they associate.

Third. Both parties would permit resolution of the issues presented on an unnecessarily broad constitutional basis, and ask the Court to ignore the actual issues presented by the facts. Irvis urges the Court to extend the concept of state action beyond constitutional limits. Appellant would have the Court gratuitously define the limits of state action in the context of private clubs by looking to the Congressional legislative history of the Civil Rights Act. Totally ignored is the fact that redress of the alleged injury was available to Irvis in tort. His claim, originally pursued as a violation of the Pennsylvania public accommodation statute, was abandoned. The logical basis for resolving the question of possible injury to the plaintiff has thus been avoided, and thrust upon the Court are novel constitutional propositions of extremely broad scope in a fact setting which should not have permitted their presentation.

Respectfully submitted,

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v.

**K. LEROY IRVIS, and WILLIAM Z. SCOTT, Chairman, EDWIN
WINNER, Member, and GEORGE R. BORTZ, Member,
LIQUOR CONTROL BOARD, COMMONWEALTH OF
PENNSYLVANIA**

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA.**

**BRIEF ON BEHALF OF WASHINGTON STATE
FEDERATION OF CLUBS AS AMICUS CURIAE**

- 1. Since No Case or Controversy Was Presented to the District Court Regarding Membership, the Injunctive Decree Exceeded the Court's Jurisdiction by Prohibiting Restrictive Membership Clauses and Discriminatory Membership Policies and Practices**

As the case is presented to the Court apparently both parties seek an advisory opinion. No issue has been presented regarding the restriction of membership. Irvis never applied for membership in Moose Lodge No. 107, and was never denied membership. He was simply denied service

by the club while a guest of a member. Yet the district court's opinion, and the various briefs, have examined in detail the specific *membership* provisions of the Lodge, and the district court found the lodge maintained a "policy and practice of restricting membership to the caucasian race". Petition for Review A3.

In its decree, the district court ordered that the Pennsylvania Liquor Control Board be permanently enjoined from issuing a liquor license to the lodge "as long as it follows a policy of racial discrimination in its membership or operating policies or practices." The district court's decree goes far beyond the case and controversy presented by prohibiting enforcement of the Lodge's restrictive membership provisions and by ordering that the Lodge's license be revoked so long as any policy or practice established by the Lodge members results in discrimination of any kind.

Evidently the parties desire a sweeping opinion by this Court on the entire subject of club discrimination. Neither party has examined the fundamental jurisdictional question of the breadth of the lower court decree. Yet any decision by this court approving the lower court decree would have great impact on any future case involving membership restrictions. In particular, it would affect several cases wherein these various issues have been raised. One is *Gerber v. Hood*, Civil No. 7701, W.D. Wash. N.D., presently pending before a three-judge federal court.

Gerber v. Hood is a class action commenced by several plaintiffs seeking to enjoin the Washington State Liquor Control Board from issuing liquor licenses to private clubs allegedly discriminating on the basis of race, religion and national origin, and seeking to require the Liquor Control

Board to revoke all licenses previously issued to such organizations. The Washington Federation of Fraternal, Patriotic, City and Country Clubs, a Washington non-profit corporation, intervened in the action on behalf of the various private clubs in the State of Washington. Intervention was permitted because the relief sought would require revocation of all liquor licenses from clubs which had restrictive membership clauses as well as clubs which discriminated by personal choice of the members without specific restriction in their constitutions or by-laws.

The Federation includes among its members approximately eighty fraternal lodges¹ and approximately eighty non-fraternal clubs, including athletic clubs, yacht clubs, golf and country clubs, veterans clubs, social clubs, and miscellaneous other clubs formed for specific private purposes.

Each of the fraternal organizations have constitutional or by-law restrictions regarding membership—typically that the member must be a citizen, 21 years of age, of good moral character, a member of the white or caucasian race,² and believe in a Supreme Being.

Approximately 10% of the non-fraternal clubs in the Federation have some form of membership restriction, most common being those of a religious nature and restrictions relating to national origin in clubs where the purpose of the club is related to persons of a common heritage. Racially restrictive clauses, while at one time gen-

1. The Benevolent and Protective Order of Elks, Loyal Order of Moose and Fraternal Order of Eagles all have local lodges which are members of the Federation; these fraternal organizations are separately represented in the action.

2. The Fraternal Order of Eagles does not have the requirement that members be of the white or caucasian race.

erally thought to be common in social clubs, golf and country clubs and many other private clubs, are rare.

However, the overwhelming majority of all of the private clubs claim the right to determine the character of the club membership based upon the attitudes and personal choice of the club members. Necessarily, this choice depends upon the character of the particular club. Likewise, membership policies vary from time to time depending upon the changing attitudes of the members. Also, membership attitudes may depend somewhat on the geographical area in which the club is located.

However, no issue as to membership restriction has been raised in the present case, and it is urged that the Court should limit its consideration to the controversy at hand. It should be obvious that hundreds of private clubs throughout the country would be affected by a broad, sweeping opinion of this Court directed toward discriminatory policies or practices in club membership.

The Court is urged to follow its long-standing practice of limiting its decision to the facts of the case, and not to render an advisory opinion on the broad subject of membership policies of private clubs and fraternal organizations.

II. The Fundamental Question Presented is Whether a Federal Court Can Constitutionally Require a State to Apply Its Liquor Laws so as to Compel a Private Group to Change its Philosophy of Association as a Prerequisite to Licensing

This Court has repeatedly held that the 1st Amendment applies to rights of association and that the members of a private group may collectively enjoy freedom of speech and association—however unorthodox, controversial or

reprehensible may be their private purposes for associating. *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Thomas v. Collins*, 323 U.S. 516 (1945); *DeJonge v. Oregon*, 299 U.S. 353. (1937).

The right of Moose Lodge No. 107 to choose its own members and to enjoy the private right of free association is conceded by appellee. Motion to Affirm 8.

The state cannot limit these rights, directly or indirectly, unless the regulation bears a reasonable relationship to the governmental purpose to be achieved. *Bates v. Little Rock*, 361 U.S. 516, (1960); *Elfbrandt v. Russell*, 384 U.S. 11^r (1966). Thus, in order for the State of Pennsylvania through its liquor licensing laws to regulate the manner in which Moose Lodge No. 107 is organized or the manner in which its guest policies are implemented, there must be a strong showing that these limitations are reasonably related to regulation of the sale of liquor. However, without so much as suggesting how the freedom of association could be so limited under the circumstances, Irvis seeks to demonstrate that the equal protection clause of the 14th Amendment requires the state to regulate the organizational policies of private clubs and fraternal lodges, even though the 1st Amendment freedoms would prevent state interference in these same matters.

Quite aside from the rights protected under the 1st Amendment, the equal protection clause does not sustain the theory propounded by Irvis. He argues that the 14th Amendment requires the state to withhold liquor licenses because of the organizational tenets of the individual licensee. However, the equal protection clause prohibits a state from discriminating on this basis between persons

and classes of persons in the application of its laws, and thus a state is compelled to grant licenses equally to all persons regardless of their beliefs.² *NAACP v. Button*, 371 U.S. 415, 444 (1963). The state cannot pick and choose between applicants upon the basis of their beliefs and philosophy, and it could not therefore constitutionally discriminate between private clubs and fraternal lodges on the basis of the particular purpose or philosophy of an individual club. If it grants licenses to some clubs, it must grant equal rights to licenses to all clubs.

Irvis apparently argues that the state must take cognizance of the purposes and conduct of each licensee, and thereby apparently attributes the philosophy and purpose of individual licensees to the state itself. But this reasoning, if accepted, would result in denial of the equal protection of the laws to those licensees who desire to exercise their 1st Amendment rights by excluding certain persons, or restricting membership in compliance with their particular group philosophy.¹

III. The Proper Remedy for the Alleged Injury Sustained by Irvis was in Tort, Under Either State Law or Federal Law

It is interesting to note that Irvis initially raised his claim before the Pennsylvania Human Relations Commission, which upheld his complaint as a violation of the public accommodation section of the 1961 Pennsylvania Human Relations Act.² On appeal to the Court of Common

1. In Appellant's Brief, repeated reference is made to competing constitutional rights between 1st Amendment rights of free speech and association on one hand and freedom from discriminatory state action on the other. It seems clear that since the equal protection clause has not been violated, Appellant's 1st Amendment rights have primacy.

2. Act of February 28, 1961, P.L. 47, 43 Purdon's Pa. Stat. Annot. §§951 *et seq.* Printed in Appendix.

Pleas of Dauphin County the commission was reversed on the public accommodation theory³, and apparently Irvis did not further appeal in state court. Instead, the thrust of his claim was shifted to an allegation that state action denied him of his privileges and immunities under the equal protection clause of the 14th Amendment. Irvis thus switched from a claim that he was injured by the lodge to a claim that the State of Pennsylvania had injured him by issuance of the liquor license.

As pointed out above, it is illogical to attribute the attitudes and purposes of the club to those of the state in the exercise of its police power; but it would be even more unfortunate to create in Irvis a novel constitutional cause of action which would permit him to compel withdrawal of liquor licenses from clubs merely because a particular licensee may have injured him or may in the future injure him.

No one has suggested that a guest cannot recover against a member of a private club, or against the club itself, for negligence or intentional tortious conduct resulting in injury. Certainly, if a guest sustains physical personal injury while in a club, or if a cause of action for defamation arises within the confines of a club, the injured guest could recover. Thus, the manner in which Irvis was refused service in the lodge after being invited as a guest might have constituted actionable defamation.

Moreover, were it to be shown that the facilities were open to the public—not shown to be the case here—injury resulting from an act of racial discrimination alone would constitute actionable tort under both state law and the

3. *Commonwealth v. Loyal Order of Moose*, 92 Dauph. 234 (1970)

Federal Civil Rights Act.⁴ Most states have public accommodation laws protecting a member of the public from the humiliation of overt racial discrimination.⁵ In both Pennsylvania and Washington, there are both criminal sanctions for illegal discrimination⁶ and civil rights and remedies created under the laws against discrimination.⁷ Typically, these public accommodation laws apply to private clubs or private establishments only to the extent that the facilities are made available to the public.⁸ For example, where a club may be open to the public for a period of time, or where one portion of a club may be open for certain purposes to the public, the public accommodation laws may apply to such public use to permit recovery for discrimination.⁹ Appellant in fact admits that to the extent its facilities are open to the public, it does admit and serve all persons regardless of race. (Stip. ¶6, A. 25, 53).

Since the facts upon which a tort action may have been founded are not before the Court, such discussion is speculation. However, the essential point is that Irvis was not without legal rights or means of legal redress for whatever injury he may have sustained. His attempt, therefore, to convert an action for personal injury into a cause of action of such incredible sweep should be scrutinized carefully. The Court should not limit the well established freedom

4. Civil Rights Act of 1964, 78 Stat. 243, USC, §§ 2000(a) and (2)(b). Printed in Appendix.

5. Public accommodation laws have been enacted by thirty-five states and the District of Columbia. Note, Public Accommodations Laws and the Private Club, 54 Geo. L.J. 915.

6. RCW 9.91.010; 18 Purdon's Pa. Stat. Annot. §§ 4653, 4654.

7. RCW 49.60.215, printed in Appendix; 43 Pa. Stat. §§ 951 *et seq.*

8. See 42 USC § 2000(e); 43 Purdon's Pa. Stat. Anno. § 954; RCW 49.60.040. All are printed in Appendix.

9. In Washington, RCW 49.60.040 makes this clear. A3.

of association in order to grant unnecessary redress to one individual. To do so would be to put in the hands of any individual^p the power to destroy those 1st Amendment freedoms which have always been carefully protected by this Court.

Respectfully submitted,

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August, 1971

APPENDIX A

Purdon's Pa. Stat. Annot., Title 18

§ 953. Right to freedom from discrimination in employment, housing and places of public accommodation

The opportunity for an individual to obtain employment for which he is qualified, and to obtain all the accommodations, advantages, facilities and privileges of any place of public accommodation and of commercial housing without discrimination because of race, color, religious creed, ancestry, age, sex or national origin are hereby recognized as and declared to be civil rights which shall be enforceable as set forth in this act.

The opportunity for an individual to obtain all the accommodations, advantages, facilities and privileges of commercial housing without discrimination due to the sex of an individual or to the use of a guide dog because of blindness of the user is hereby recognized as and declared to be a civil right which shall be enforceable as set forth in this act.

§ 954. Definitions

As used in this act unless a different meaning clearly appears from the context:

(1) The term "place of public accommodation, resort or amusement" means any place which is open to, accepts or solicits the patronage of the general public, including but not limited to inns, taverns, roadhouses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants or eating houses, or any place where food is sold for consumption on the premises

... but shall not include any accommodations which are in their nature distinctly private.

§ 955. Unlawful discriminatory practices

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

(i) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employe of any place of public accommodation, resort or amusement to

(1) Refuse, withhold from, or deny to any person because of his race, color, religious creed, ancestry or national origin, either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such place of public accommodation, resort or amusement.

Revised Code of Washington, Title 49

49.60.040 Definitions. As used in this chapter:

"Any place of public resort, accommodation, assemblage or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire or reward, or where charges are made for admission, service, occupancy or use of any property or facilities, whether conducted for the entertainment, housing or lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation or rest,

or where food or beverages of any kind are sold for consumption on the premises, or where public amusement,

entertainment, sports or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation or public purposes, or public halls, public elevators and public wash-rooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: *Provided*, That nothing herein contained shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything herein contained apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution; in connection with a religious organization or any bona fide private or fraternal organization from giving preference to persons of the same religion or denomination or to members of such private or fraternal organization or from making such selection as is calculated by such organization to promote the religious principles or the aims, purposes or fraternal principles for which it is established or maintained. Nor shall it apply to the rental of rooms or apartments in a landlord occupied rooming house with a common entrance.

**49.60.215 Unfair practices of places of public resort,
accommodation, assemblage, amusement**

It shall be an unfair practice for any person or his agent or employee to commit an act which directly or indirectly

results in any distinction, restriction, or discrimination or the requiring of any person to pay a larger sum than the uniform rates charged for other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement except for conditions and limitations established by law and applicable to all persons; regardless of race, creed, color, or national origin.

United States Code Annotated, Title 42

**§ 2000a. Prohibition against discrimination or segregation in places of public accommodation—
Equal access**

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

• • •

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

• • •

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

• • •

Private establishments

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

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**OBJECTION OF APPELLEE K. LEROY IRVIS TO
MOTION OF WASHINGTON STATE FEDERATION OF
FRATERNAL, PATRIOTIC, CITY AND COUNTRY
CLUBS FOR LEAVE TO FILE BRIEF
AMICUS CURIAE.**

Rule 42(2) of this Court states that a brief *amicus curiae* in cases before the Court on the merits may be filed, if the parties consent thereto, "only . . . when . . . presented within the time allowed for the filing of the brief of the party supported."

The initial request to Appellee Irvis for consent to file a brief *amicus curiae* on behalf of the Washington State

Federation of Fraternal, Patriotic, City and Country Clubs (Federation) was made by letter from counsel for the Federation to counsel for Irvis dated August 9, 1971. This was 45 days after the date on which the brief for Appellant Moose Lodge was filed with the Court and, indeed, after the date on which Appellee Irvis' brief (due August 24, 1971) had gone to the printer. Irvis was thus effectively precluded from considering any issues or allegations made by the Federation in its brief.

Despite the ingenious statement appearing in paragraph 3 of the Federation's motion that its motion is presented in support of neither party, it is quite clear from even the most superficial perusal of its motion and brief that every word supports the position of Moose Lodge. Therefore, the last date for presentation was June 25, 1971, almost three months after the Court ordered the case set for hearing. The Federation could certainly have presented its request well within the time set by Rule 42(2).

Because of the violation of this Rule by the Federation and its accompanying effect of precluding consideration of the Federation's comments by Irvis, consent was withheld in response to the August 9 letter of the Federation's counsel. The fact is that this consent was first requested simultaneously with the filing of the motion and brief by the Federation. Therefore, the statement appearing in paragraph 3 of the motion that appellee has not granted consent was incorrect at the time it was written and can only be considered an accurate prophecy of Irvis' response.

Finally, Irvis suggests that the motion and brief do not comply with the requirements of Rule 42(3). While the Federation states in paragraph 4 of its motion that its motion is made because the legal issues will not be adequately presented to the Court, there is nothing in its subsequent three-part explanation which in any way raises a

meritorious issue not adequately presented in the brief of appellant Moose Lodge. Further, it is less than candid in its reference to the unsuccessful action taken under the Pennsylvania public accommodation statute (p. 3 of motion, pp. 10-13 of proposed brief). Irvis is not a party to that action and had no right of appeal therein.

Because of these violations of the rules of the Court, Irvis believes the Federation's motion should be denied. Had it been presented prior to June 25, 1971, Irvis would not have objected and would have been able to comment on the Federation's position in his own brief.

Respectfully submitted,

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September, 1971